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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 347.

MAX JABEN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

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OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 333 F. 2d 535 (8th Cir. 1964). Two district court opinions are reported at 225 F. Supp. 47 (W. D. Mo. 1963) and 226 F. Supp. 757 (W. D. Mo. 1963). An order of the Eighth Circuit overruling a petition for prohibition or in the alternative for mandamus or certiorari is reported as **Jaben v. Duncan**, 324 F. 2d 956 (8th Cir. 1963).

JURISDICTION.

The judgment of the Eighth Circuit Court of Appeals was entered on June 16, 1964 (R. 63). A timely motion for rehearing was denied on July 9, 1964 (R. 64). Petitioner filed his petition for certiorari on August 3, 1964. Certiorari was granted on October 19, 1964. The jurisdiction of this Court to review the decision was invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

1. Do Rules 3 and 4 of the Federal Rules of Criminal Procedure, construed in light of the Fourth Amendment to the Federal Constitution, permit the Commissioner to issue a complaint and summons in a tax evasion case thereby tolling the six year statute of limitations, Title 26. U. S. C., § 6531, where such complaint and summons is issued solely on the basis of a form affidavit with blanks filled in; executed by a Special Agent of the Internal Revenue Service, adopted by the Justice Department for use in tax evasion cases, wherein *pro forma* the agent avers that he has personal knowledge that taxes were evaded by reason of his having interviewed unnamed persons allegedly doing business with the taxpayer "and having knowledge of said taxpayer's financial condition", and his having examined unspecified public and private documents "reflecting the said taxpayer's income"; where in addition to containing said *pro forma* allegations, there is no basis alleged for crediting the veracity of the unnamed persons and unspecified documents, and there is no basis averred for establishing which statements are based on the agent's personal knowledge and which are based on hearsay?

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED.

1. The Fourth Amendment to the Federal Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized."

2. 68 A. Stat. 815, Title 26 U. S. C. § 6531, provides in pertinent part, as follows:

> "No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after commission of the offense, except that the period of limitation shall be 6 years—
>
> * * * * * * * * *
>
> "(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;"
>
> * * * * * * * * *
>
> ". . . Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States . . ."

3. Rule 3 of the Federal Rules of Criminal Procedure provides:

"**Rule 3. The Complaint**

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

4. Rule 4 of the Federal Rules of Criminal Procedure provides in pertinent part, as follows:

"**Rule 4. Warrant or Summons Upon Complaint**

(a) **Issuance.** If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the Government a summons instead of a warrant shall issue. . . ."

STATEMENT.

Petitioner was indicted on a three count indictment; Count I of the indictment charges tax evasion for the year 1956 by the filing of a false return on April 16, 1957. The indictment was returned on May 17, 1963, more than six years after the return was alleged to have been filed (R. 3-5). By appropriate motions, petitioner moved to dismiss Count I on the grounds that it was barred by the statute of limitations (R. 44). A hearing was held on August 6, 1963 (R. 9). The Court held that the complaint (R. 1) filed April 15, 1963, tolled the statute of limitations (R. 47-49).

At the hearing on August 6, 1963, Lee E. Cisel, Commissioner for the Western District of Missouri at Kansas City, testified in behalf of appellant (R. 10-17). He testified that on April 15, 1963, he issued a summons for appellant based upon a complaint filed with him on that date (R. 11). The complaint reads as follows:

> "The undersigned complainant, being duly sworn, states:
>
> "That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of Max Jaben for the calendar year 1956, by examining the said taxpayer's tax return for the year 1956, and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of said taxpayer's financial condition.
>
> "That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 16th day of April, 1957, at Kansas City, Missouri,

Max Jaben did unlawfully and willfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue of the District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return, wherein he stated that his taxable income for the calendar year 1956 was $17,665.31, and that the amount of tax due and owing thereon was the sum of $6,017.32, when in fact his taxable income for the said calendar year was the sum of $40,001.76 upon which said taxable income he owed to the United States of America an income tax of $14,569.99" (R. 1).

Mr. David Thompson, a Special Agent for the Internal Revenue Service, accompanied by Mr. Featherstone of the Justice Department, came into Commissioner Cisel's office on April 15, 1963, with the complaint. He read the complaint which was signed by Thompson, found it sufficient and signed his name to the summons. Thereafter, he certified a copy of the complaint and gave it to Mr. Thompson or Mr. Featherstone to be taken to the Marshal's office. That was all that took place at that time (R. 16). Thereafter, at the request of the United States Attorney, no further proceedings were conducted by the Commissioner (R. 7-8, 13).

After all motions to dismiss were overruled, petitioner applied to the Eighth Circuit for a writ of prohibition, or in the alternative for mandamus or certiorari, to prevent further proceedings on Count I. This petition was overruled without prejudice to the bringing of the instant appeal, Jaben v. Duncan, 324 F. 2d 956 (8th Cir., 1963).

Thereafter, on December 2, 1963, through his counsel, appellant entered his plea of *nolo contendere* to the facts of Count I of the indictment, specifically reserving the right to appeal on the question of whether or not the

count is barred by the statute of limitations (R. 51). The district court accepted appellant's plea and on January 7, 1964, sentenced appellant to a term of two years, four months of which sentence was to be served; appellant was placed on probation for the remaining twenty months (R. 52-53). The two remaining counts were dismissed by the government. On January 15, 1964, petitioner appealed to the Eighth Circuit from the judgment of conviction and foregoing sentence (R. 54-55).

In the Eighth Circuit, petitioner urged that the only issue was whether or not the complaint based on the affidavit satisfied the requirements of Rules 3 and 4 of the Federal Rules of Criminal Procedure construed in light of the Fourth Amendment to the Federal Constitution; if the complaint were valid the statute of limitations, Title 26, U. S. C. § 6531, was tolled and the judgment should be affirmed; otherwise if the complaint were invalid the statute was not tolled and the judgment should be reversed. Both the Government and the Eighth Circuit accepted this premise (R. 58). Accordingly, the only issue in the case was the validity of the complaint.

Petitioner relied primarily on the case of **Greenberg v. United States**, 320 F. 2d 467 (9th Cir. 1963), a case involving a virtually identical complaint which was declared invalid and incapable of tolling the statute of limitations by the Ninth Circuit based on this Court's decision in **Giordenello v. United States**, 357 U. S. 480, 486, 78 S. Ct. 1245, 1250, 92 L. Ed. 436 (1958).

It was urged that the instant complaint failed to "pass muster," because the complaint on its face established the absence of personal knowledge and there were no facts alleged which would demonstrate personal knowledge.

Petitioner also cited to the Circuit Court of Appeals this Court's decision in **Jones v. United States**, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), urging that since

Giordenello applied the same criteria to arrest warrants as to search warrants the case was directly in point. Petitioner further urged that since the affidavit herein was based on hearsay, i. e., information obtained from unnamed persons and unspecified documents, and that since there was no basis for crediting the hearsay the affidavit was invalid in light of **Jones**, supra.

Finally, petitioner relied upon the case of **Ventresca v. United States**, 324 F. 2d 864 (1st Cir. 1963), certiorari granted 377 U. S. 989 (1964). It was urged that although the affidavit herein alleged the complainant had personal knowledge, on its face the affidavit showed that at least some of his information was hearsay, and therefore the affidavit was insufficient for failing to designate which statements were based on hearsay and which were based on personal knowledge.

The Government relied principally on the cases of **United States v. Black**, 216 F. Supp. 645 (W. D. Mo. 1963); **United States v. Scheetz**, 224 F. Supp. 789 (S. D. Ind. 1963); and **Sanseverino v. United States**, 321 F. 2d 714 (10th Cir. 1963), all of which cases held that form complaints virtually identical to that involved in the instant case were sufficient to toll the statute of limitations. (The **Black** case is worth special mention for the reason that it arose out of the same district as the instant case; accordingly, the same commissioner, Mr. Cisel, was involved.)

Rejecting the Ninth Circuit's opinion and relying on its own interpretation of **Giordenello**, supra, the Eighth Circuit held the complaint sufficient, relying upon **Sanseverino**, supra, **Black**, supra, and **Scheetz**, supra. Thus, this case is one where there is a clear and undeniable conflict between the decision in the instant case and the decision of the Ninth Circuit in **Greenberg**, supra.

In the motion for rehearing, petitioner called the Circuit Court's attention to the case of **Aguilar v. Texas**,

378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), which had been decided the day prior to the Eighth Circuit's opinion. In **Aguilar**, this Court reaffirmed that the same standards of probable cause apply to arrest warrants as well as to search warrants and that **Jones** as well as **Giordenello** must be considered by the court. Petitioner also pointed out that this Court articulated the requirement that the commissioner be informed of the "underlying circumstances" from the officer concluded the informant was "credible" or his information "reliable." It was urged, therefore, that as here the Commissioner was looking at a form affidavit almost identical to that he had already seen in **United States v. Black**, supra, he could not possibly be informed of the "underlying circumstances;" therefore, the affidavit was insufficient in light of **Aguilar**, **Jones** and **Giordenello**. The motion for rehearing was denied on July 9, 1964, without opinion.

ARGUMENT.

Petitioner Max Jaben entered a plea of *nolo contendere* to Count I of a three count indictment[1] charging him with tax evasion in violation of 68A Stat. 851, Title 26, U. S. C., § 7201. Jaben was charged in this count with tax evasion for the year 1956 by filing a false income tax return on April 16, 1957. The indictment herein was returned on May 17, 1963 (R. 3). Thus, more than six years elapsed between the date the offense is alleged to have occurred and the date the indictment was returned. However, a complaint was filed within the six year period on April 15, 1963 (R. 1-2).

Jaben urged in the District Court and in the Court of Appeals that the indictment was not timely filed and that therefore prosecution was barred on Count I by virtue of 68A Stat. 815, Title 26, U. S. C., § 6531, having been brought more than six years after the offense is alleged to have occurred. It was his position below that although a complaint was filed within the six year period, it did not toll the statute of limitations because it was invalid. The Government conceded below that the plea of *nolo contendere* did not foreclose this appeal and that if the complaint was defective, the indictment was invalid. Petitioner in turn conceded that if the complaint were valid, the indictment was timely brought (R. 58). Accordingly, the only issue before this Court is the validity of the complaint.

1. The complaint is invalid under the Fourth Amendment.

The complaint herein is a form complaint with the blanks filled in. Passing for the moment the implications

[1] The remaining two counts were dismissed by the Government (R. 58).

connected with the use of forms to satisfy the Fourth Amendment, we submit that the complaint filed below is invalid on its face. The complaint executed by Special Agent Thompson avers that he conducted an investigation of Jaben's tax liability for the year 1956 "by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of said taxpayer's financial condition." The complaint then concludes "[t]hat based on the aforesaid investigation, the complainant has *personal knowledge* that on or about the 16th day of April, 1957 . . . Max Jaben [evaded income taxes by reporting an income of $17,665.31 when his true income was $49,001.76]." (R. 1-2). In short, the agent claims "personal knowledge" based on unspecified information obtained from unnamed persons and unspecified documents which reflect the taxpayer's income.

An evaluation of the validity of the complaint must begin with this Court's decision in **Giordenello v. United States**, 357 U. S. 480, 78 S. Ct. 1245, 4 L. Ed. 2d 1503 (1958), which enunciated the requirements of a valid complaint in terms of Rules 3 and 4 of the Federal Rules of Criminal Procedure construed in light of the Fourth Amendment, as follows:

> "Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential facts constituting the offense charged,' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and that the defendant committed it . . .' The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirma-

tion, and particularly describing * * * the persons or things to be seized * * *,' of course applies to arrest as well as search warrants. See Ex Parte Burford, 3 Cranch 448, 2 L. Ed. 495; McGrain v. Daugherty, 273 U. S. 135, 154-157, 47 S. Ct. 319, 323, 71 L. Ed. 580. The protection afforded by these Rules when they are viewed against their constitutioned background, is that the inferences from the facts which lead to the complaint '* * * be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime' * * *. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

"When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. *The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not set forth any other sufficient basis upon which a finding of probable cause could be made* * * * 357 U. S. at 486, 78 S. Ct. at 1250 (Emphasis Supplied)."

The agent's claim herein that he had "personal knowledge" of tax evasion is evidently inserted into the complaint in response to the above italicized portion of the **Giordenello** opinion. And, the Eighth Circuit relied

heavily on this allegation in sustaining the complaint (R. 61).

We do not understand the above italicized portion of the opinion in **Giordenello** to hold that a mere naked allegation of "personal knowledge" is sufficient to validate a complaint. Otherwise, a complaint wherein the agent merely stated, "I have personal knowledge that the taxpayer committed tax evasion" would be valid. A complaint framed solely in such terms, however, would be patently invalid, for then we would have "the inferences from the facts which [led] to the complaint . . . drawn . . . by [an] officer engaged in the often competitive enterprise of ferreting out crime" rather than by "a neutral and detached magistrate", contrary to the teachings of **Giordenello.** See also, **Johnson v. United States,** 333 U. S. 10, 14, 68 S. Ct. 367, 92 L. Ed. 436 (1948); **Aguilar v. Texas,** 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 723 (1964).

Besides, although the Special Agent herein stated that he had "personal knowledge", he stated he had "personal knowledge" based on his investigation which consisted of examination of unnamed persons and unspecified documents. It is submitted that "personal knowledge" based on information derived from others is not "personal knowledge" at all, and therefore this allegation stands on no different footing than the statement in **Nathanson v. United States,** 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159 (1933), that the affiant "has cause to suspect and does believe" or the statement in **Aguilar v. Texas,** 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), that the affiants "do believe". By itself, these allegations do not support the issuance of a warrant. Something more is necessary, a "statement of adequate supporting facts". **Nathanson,** supra, 290 U. S. at 46, 54 S. Ct. at 13. This is what **Giordenello v. United States,** 357 U. S. 480, 486, 78 S. Ct. 1245, 1250, 2 L. Ed. 2d 1503 (1958), held. See

discussion in **Aguilar v. Texas**, supra, 378 U. S. at 112, 84 S. Ct. at 1509.

The question of the validity of the complaint herein, then, is whether it contained a "statement of adequate supporting facts." **Nathanson**, loc. cit., supra. The statement supporting the Agent's conclusions, as indicated, avers that he interviewed unnamed third persons and examined unspecified documents. Clearly the Agent's conclusions are based on hearsay. Of course, an affidavit may be based on hearsay information and need not reflect personal observations of the affiant so long as there is a "substantial basis for crediting the hearsay", **Jones v. United States**, 362 U. S. 257, 269, 80 S. Ct. 725, 735, 4 L. Ed. 2d 697 (1960). But, where there is no "substantial basis for crediting the hearsay", the statement of supporting facts is inadequate and the complaint must be declared invalid. Cf. **Beck v. Ohio**, ... U. S. ..., 85 S. Ct. 223, ... L. Ed. 2d ... (1964). Then, what basis is there for crediting the hearsay upon which the Agent relied? He allegedly relied on two types of hearsay information, (1) "public and private records reflecting the said taxpayer's income", and (2) persons "having knowledge of the said taxpayer's financial condition" and "with whom the said taxpayer did business" (R. 1). But what kind of documents were involved? Who prepared them? Were these persons credible? And what information did they contain? Also, with whom did the taxpayer do business? What kind of business? What did they know about his financial affairs? Just what did they tell the agent? Were they credible people? The affidavit is silent on these questions. Without the answers to at least some of these questions, we submit there was no "substantial basis for crediting the hearsay". After all, "the magistrate must be informed of some of the underlying circumstances." **Aguilar v. United States**, supra, 378 U. S. at 114, 84 S. Ct. at 1514, 12 L. Ed. 2d 723.

Although the complainant alleged he had "personal knowledge", as indicated previously, his so-called "personal knowledge" is not personal knowledge since it is based on hearsay. Even if he can be credited by this allegation with some personal knowledge, his conclusion that Jaben committed the crime of tax evasion is still based in part on hearsay. It is therefore submitted that the complaint is invalid nevertheless because the affidavit does not state which facts are based on hearsay and which are based on personal knowledge. This question is now before the Court in **Ventresca v. United States**, 324 F. 2d 864 (1st Cir.), cert. granted 377 U. S. 989, 84 S. Ct. 1910 (1964). It is submitted that the question was decided correctly in the First Circuit. In any event, in the instant case, we cannot know of any specific fact within the knowledge of the agent. For all we knew, then, his conclusion is based entirely on hearsay, and for the reasons above indicated, there is no "substantial basis for crediting the hearsay."

2. **A form complaint cannot satisfy the Fourth Amendment.**

A magistrate, here a Commissioner, "must perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." **Aguilar v. Texas**, supra, 378 U. S. at 111, 84 S. Ct. at 1512. The Commissioner here, however, was looking at a form complaint with the blanks filled in, and we submit that by issuing the complaint based solely on the form affidavit supplied him by Agent Thompson, he acted merely as a "rubber stamp" and not as a "neutral and detached magistrate."

The form complaint used by the government herein is as follows:

> "The undersigned complainant, being duly sworn, states:
>
> "That he is a Special Agent for the Internal Revenue Service, and, in the performance of the duties

imposed on him by law, he conducted an investigation of the Federal income tax liability of . . . (name of taxpayer) . . . for the calendar year . . . by examining the said taxpayer's tax return for the calendar year . . . and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons, having knowledge of the said taxpayer's financial condition."

"That based on the aforesaid investigation, the complainant has personal knowledge that on or about the .... day of ....., 19.., at ..... (City), ... (State), ... in the district of ..... (State), ..., (name of taxpayer) . . . did unlawfully and wilfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year ....., by filing and causing to be filed with the District Director of Internal Revenue for the District of ....., (City), ... (State), ..., at ..... (City), ... (State), . . . a false and fraudulent income tax return, wherein he stated his taxable income for the calendar year ..... was ..... (income shown on tax return) . . . and the amount due and owing for thereon was the sum of ..... (amount of tax due as shown on return), . . . when in fact, his taxable income for the calendar year was the sum of ..... upon which said taxable income he owed to the United States of America an income tax of .....

(Signed) .....
Special Agent, Internal Revenue Service,
.....
(City) (State)

It is clear from the foregoing that all blanks, save one, can be filled in by obtaining the information directly from the taxpayer's tax return at the office of the Internal Revenue Service. The remaining blank is the one wherein the amount of the true taxable income, according to the Special Agent, is filled in. Thus, the whole affidavit boils down to the Special Agent's unsupported conclusion that the taxpayer's actual income, as opposed to his reported income, was a certain number of dollars.[2] And this conclusion is the only basis on which the Commissioner could base his finding of probable cause.

It is, to say the least, difficult (and we think impossible) to square the usage of form complaints with the requirement of **Jones**, supra, 362 U. S. at 269, 80 S. Ct. at 735, that there be substantial basis alleged in the affidavit for crediting the information supplied by unnamed persons. Similarly, the usage of form complaints does not satisfy the requirements of **Aguilar**, supra, 378 U. S. at 114, 84 S. Ct. at 1514, that the magistrate be informed of the "underlying circumstances" from which the officer concluded these persons were reliable; and finally, this

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[2] Actually, the Special Agent's conclusion that the true taxable income is a certain amount is meaningless. It is universally held that the Government is not required to prove that the true taxable income is that alleged in the indictment. It need only prove that the actual income was substantially in excess of that reported and that, therefore, a substantial amount of taxes was evaded. See, *United States v. Johnson*, 319 U. S. 503, 63 S. Ct. 1233, 87 L. Ed. 1546 (1943). Thus, the effect of the affidavit would not be altered if instead of stating the amount of actual income the affidavit read:

> ". . . wherein he stated that his taxable income for the year . . . was . . ., and that the amount due and owing thereon was the sum of . . ., when in fact his taxable income for the said calendar was [substantially in excess of the amount reported] and upon said taxable income he owed to the United States of America an income tax [substantially in excess of the amount of . . .]."

With this slight modification, the blanks could be filled in using only the records on file within the Internal Revenue Service without changing the legal effect of the affidavit.

form complaint could not satisfy the purpose of a complaint, as set out in **Giordenello**, supra, 357 U. S. at 486, 78 S. Ct. at 1250:

> "The purpose of the complaint . . . is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists."

It is difficult to see how we could say with the above form complaint that the "inferences from the facts which [led] to the complaint . . . [were] drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

If the purpose of the complaint is to supply the commissioner with facts from which he could draw the inference of probable cause, a form complaint is defeating of this purpose. The Government has drafted a form which is so universal in its application that it is literally true even when viewed in light of the myriad possibilities of tax evasion. By being so universally applicable, it is robbed of its sole function—it does not supply "facts" from which a commissioner can find probable cause.

Furthermore, the implications stemming from the sanctioned use of form affidavits are staggering. If a form complaint is appropriate with respect to a complaint, it would be appropriate with respect to search warrants. Certainly, if the Government could reduce the multitude of fact situations to generalized forms (which we think it will admit it is attempting to do), the situations where a person goes free because the "constable blundered" would be reduced. But, what would happen to the Fourth Amendment? We think it would be reduced to a game of finding and filling in the appropriate form. Further, the more universal the applicability of the form, the less likely it is to supply the necessary facts to the commissioner.

Besides, the possibilities of abuse inherent in the sanctioned use of universal form complaints are amply demonstrated by the testimony of Agent Thompson adduced in the instant case. It is clear that he did not even understand let alone prepare the affidavit he signed under oath before the Commissioner (R. 20). Yet the Commissioner based on this affidavit found probable cause existed, in the same way the same Commissioner found that the very same affidavit was sufficient to allege probable cause in another case, **United States v. Black**, 216 F. Supp. 645 (W. D. Mo. 1963).

The government has long adhered to the use of form complaints in its efforts to toll the statute of limitations. Some courts held earlier forms invalid. See e. g., **United States v. Freeman**, 165 F. Supp. 47 (S. D. Ind. 1958); **United States v. Langsdale**, 115 F. Supp. 489 (W. D. Mo. 1953). Other courts held the form invalid, **United States v. DeHardit**, 120 F. Supp. 110, affirmed 224 F. 2d 673 (4th Cir. 1955). Evidently, after this Court's decision in **Giordenello v. United States**, 357 U. S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958), the government abandoned its earlier forms in favor of that employed in the instant case. (See Gov. Br. in 8th Cir., p. 18, fn. 4.) That this form is in use in the Seventh, Eighth, Ninth Circuits is amply demonstrated by the cases of **United States v. Scheetz**, 224 F. Supp. 789 (S. D. Ind. 1963); **United States v. Black**, 216 F. Supp. 645 (W. D. Mo. 1963); **United States v. Greenberg**, 320 F. 2d 467 (9th Cir. 1963); and **Sanseverino v. United States**, 321 F. 2d 714 (10th Cir. 1963). We call upon the government in its brief to inform the Court of the nature and extent of the usage of this form throughout the country.

It is difficult to understand why with a six year statute of limitations the government insists on waiting until the last minute before filing a complaint in an effort to toll

the statute of limitations. That such delay is universal is amply demonstrated by the foregoing cases.

If the government investigated diligently, the six years granted them by Congress would be sufficient and it would not have to resort to form affidavits to circumvent the will of Congress and short circuit the Fourth Amendment. On the other hand, the danger to the individual inherent in the "rubber stamp" application of the Fourth Amendment is manifest. Accordingly, it is submitted that this Court should in this case strike down short cut applications of the Fourth Amendment, such as employed here.

CONCLUSION.

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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